THE POLITICAL ASPECTS

OF

RAILROAD REGULATION.

A CRITICISM

OF THE

Eleventh Annual Report

of the

nterstate Commerce Commission

By JOSEPH NIMMO, Jr.

[Given to the Press January 20, 1898.]

WASHINGTON, D. C.:
RUFUS H. DARBY, PRINTER AND PUBLISHER,
1898.

Criticism of the Eleventh Annual Report

OF THE

Interstate Commerce Commission.

The Eleventh Annual Report of the Interstate Commerce Commission is devoted mainly to the object of inducing Congress to grant to it full rate-making powers and other important administrative functions in the management of traffic over railroads in the United States. This involves a scheme of regulation differing radically from that provided in the Interstate Commerce Act, antagonistic to fundamental principles upon which our governmental system rests, and detrimental to the commercial and industrial interests of this country.

In the beginning the Commission repudiated the idea that the Act to Regulate Commerce grants to it any rate-making powers whatsoever. Subsequently, however, it conceived the idea that, by implication, the law does give it the power to prescribe rates which shall be observed in the future and proceeded to set the assumed power in motion. This change of opinion and of policy was evolved by degrees. At first the Commission thought it was endowed with the power to prescribe maximum rates, but not minimum rates; next, that it had the power to prescribe both maximum and minimum rates, and finally, that it had the power to prescribe maximum rates, minimum rates and absolute rates. But the decision of the Supreme Court of the United States in the Cincinnati-Chicago Freight Bureau case, delivered May 24, 1897, dispelled that fiction.

The Commission has for years been in bad humor with the Federal Judiciary and in its eleventh annual report gives vent to its feelings. Now it seeks to gain by legislation that which it has been denied by the courts.

Since the year 1890 the Interstate Commerce Commission has evolved another idea as to its administrative powers based upon the assumption that under the provisions of the third section of the Act to Regulate Commerce it is endowed with authority to prescribe the rates which shall prevail on railroads in one part of the country with reference to the rates which shall prevail on railroads in other parts of the country. For example, the Commission assumes the power to determine the rates from a city in Illinois to a city in Alabama with reference to the prevailing rates from a city in Massachusetts to a city in Georgia, or to determine the rates on the products of a mine in Michigan with reference to the rates on the products of a mine in Kansas to common points or to different points in the same State or section of the country.

The language of sections one and three clearly indicate that the provisions of the Act to Regulate Commerce apply only to particular lines and "for a continuous carriage or shipment." But this measure of regulation applies to traffic over connecting lines from the Canadian border to the Gulf, and from the Atlantic to the Pacific Coast. Besides, experience proves that it goes to the very limit of beneficent regulation without antagonizing any established principle of commercial freedom. (See Appendix.)

The attempted usurpation of authority by the Commission both as to rate-making and as to the power to determine relative rates in different parts of the country was clearly illustrated in a recently adjudicated case:

On December 26, 1891, the Cincinnati Freight Bureau, an adjunct of the Cincinnati Chamber of Commerce, and the Chicago Freight Bureau, an adjunct of the Chicago Board of Trade, filed complaints with the Interstate Commerce Commission to the effect that the rates charged on railroads connecting Cincinnati, Chicago and other Western towns and cities with points south of the Ohio River and east of the Mississippi River, were unduly high in proportion to the rates then charged on all rail and on connecting rail and coastwise steamer lines connecting Baltimore, Philadelphia, New York, Boston and other Eastern towns and cities, with the same points in the section of the country south of the Ohio and east of the Mississippi Rivers.

Under an interpretation of the law as to its powers of rate-making, which the Supreme Court has since repelled, the Commission ruled that the rates on merchandise shipped from Cincinnati, Chicago and other Western points styled Central Territory, to points in the South Atlantic and Gulf States styled Southern Territory, should be reduced, according to certain prescribed schedules, in such manner as to bring those rates into an assumed proper relation to rates from Baltimore, Philadelphia, New York, Boston and other points, styled Eastern Seaboard Territory, to the said Southern Territory. In this suit thirty railroad companies and five coastwise steamer lines were made parties defendant. The case involved the commercial and industrial interests of more than twenty States east of the Mississippi River. That it raised a dangerous sectional issue is undeniable. This the Interstate Commerce Commission has never attempted to palliate or deny. If the Commission can dictate the rates which shall prevail as between the West and the East

in trade with the South, it can also dictate a thousand other rates involving the relative advantages of States and sections of the country. Thus the fortunes of commerce, manufacture and mining, in all parts of this vast country, would be subject to the dicta of the Interstate Commerce Commission, upon a false assumption of the power of rate-making and a false interpretation of the third section, which forbids any undue preference to any particular locality.

Even if the interpretation given to Section 3 by the Commission were accepted as law, experience has proved that it is outrageously opposed to sound views of public policy, besides being absolutely futile as a measure of regulation.

In order more clearly to appreciate the dangerous character of such delegation of power to a branch of the Administrative Government, let it be assumed that a bill had been introduced in Congress to reduce rates from "the West" to "the South," so as to make them bear an assumed proper relation to rates from "the East" to "the South." This is just what was attempted in the Cincinnati–Chicago Freight Bureau case, decided by the Commission and set aside by the Supreme Court of the United States, with expressions of supreme contempt. What would have been thought of such a bill in Congress? It would have become the subject of ridicule. No Senator or Member of Congress would have failed to see that it would inaugurate the most bitter and destructive of all sectional issues—those involved in the struggles of commercial and industrial competition. The action of the Interstate Commerce Commission in the Cincinnati-Chicago Freight Bureau case escaped public reprobation only as it escaped observation.

And yet with a degree of presumptuousness unpar-

alleled in the political history of the United States, the Interstate Commerce Commission now appeals to Congress to grant to it those very powers which the Supreme Court has denied it on purely legal grounds. The particular features of this extraordinary appeal to Congress are presented as follows:

WHAT THE COMMISSION ASKS OF CONGRESS.

(*a*) The plea of the Commission that it be granted the power to prescribe rates, which shall prevail for the future, pervades the entire report. It is, therefore, unnecessary to refer to particular expressions upon that point.

(*b*) On page 24 the Commission asks that it be invested with the power to determine "differentials" in the case of competing lines. In this the Commission recognizes the necessity for agreements between competing railroads as to the difference in rates which shall prevail on competitive traffic in order that each line may be able to secure an equitable share of the traffic competed for, and in order also that rival traders and competing commercial and industrial centers may be fairly treated. Such differences in rates, as determined by governing conditions, are known as "*differentials.*" If the Commission were by law invested with the authority to act as arbitrator in such cases at the request of competing carriers, it would perhaps be just and beneficial; but to exercise the power to determine differentials of its own motion and by virtue of its own authority would be in the nature of an autocratic interference with the freedom of transportation and of trade. Competitive struggles are inevitable incidents of enterprise and are not proper objects of governmental intermeddling, except in so far as relates to the maintenance

of order and the administration of justice. Besides it must be remembered that trade forces are always greatly superior to those of transportation.

(*c*) On page 71 *et seq.*, the Commission asks that it be invested with the power to compel each carrier to make the same through arrangements with all of its connections. This is an expression of governmental imperialism which was guarded against by the framers of the Act to Regulate Commerce, in Section 3, wherein it is provided that railroads subject to the act shall afford "all *reasonable, proper and equal* facilities for the interchange of traffic according to their respective powers." Section 3 also declares that no carrier shall be compelled to give the use of its tracks or terminal facilities to another company.

(*d*) The proposition on pages 26 and 27 to invest the Commission with the power to determine the conditions of joint rate-making is an assault upon the freedom of contract. For reasons already stated it goes in the face of established principles of free government.

(*e*) What is said on pages 34 and 35 under the title "To what extent should orders be subject to judicial review," revives the old claim of the Commission to the exercise of judicial functions, a claim which has been spurned by the Federal Courts and discarded by Congress. Years ago the Commission itself repelled any such admixture of powers, uttering the familiar legal maxim that "no prosecutor in a transaction should be allowed to become a judge in the same." If the Commission should be endowed with all the administrative and judicial powers which it seeks, such powers in connection with those which it has by law, would make it at once detective, investigator, prosecutor, judge and autocrat in the same action—functions as incongruous as those of Pooh Bah in the play.

(*f*) The Commission proposes, on pages 143 and 145, that it be invested with the power to promulgate "administrative orders" and "final administrative orders." Such orders would be as autocratic as those orders-in-Council, for the issuance of which Charles the First lost his head. Presumably Congress and the country will perceive that in this matter the Commission has already lost its head.

(*g*) It is proposed, on page 141, that instead of ten days notice by the carrier of the increase of any rate, and three days notice of the decrease of any rate, the time shall be extended to sixty days in each case. This would be intolerable to the interests of transportation, of industry and of trade. It is also proposed to give the Commission power to grant changes in rates upon less than sixty days notice. This is not regulation. It is despotic rule—open and undisguised. It involves dispensing power, the most repulsive expression of autocratic government.

(*h*) In the paragraph on page 142, beginning with the words "A rate, fare or charge established," &c., the Commission asks Congress to grant to it the power to tie up any railroad as to its rates, fares and charges once established by it, and forbids departure from any classification, privilege, facility or regulation so determined, until released by the Commission. Meanwhile its competitors may ruin its business and force it into bankruptcy. This in many instances would amount to confiscation, for while held up by the Commission a line thus situated might have its traffic diverted by rival lines and be driven into bankruptcy.

(*i*) The Commission violates all rules as to the temperate administration of the law by recommending an expedient unmistakably vengeful. This is found on pages 142 and 143. Here it is proposed that in the case

of a carrier which refuses to obey the mandate of the Commission, that body shall have absolute power to limit its total receipts from traffic, to prescribe its maximum and minimum rates, to determine its share of joint rates, to change its classification of freights, and finally, by way of extreme torture, to change its rules and regulations in regard to traffic. The purposes of the Commission upon this point would perhaps be as well accomplished if it were granted the power to cast the contumacious carrier into outer darkness.

(*j*) Perhaps the most audacious proposition found in this entire report is that on page 146, an amendment to section 4. Here it is proposed to strike out the consideration of "circumstances and conditions" in the application of the "long and short haul" rule, and in lieu thereof to substitute the discretion of the Commission. That caps the climax of autocratic rule. Perhaps more than any other feature of the report, it reveals the struggle for power which runs through this entire report.

(*k*) Apparently fearful that some one or more of the foregoing proposed amendments to the law might fail to work, the Commission throws out a drag-net in the form of a proposed amendment to section 6, which provides that the whole matter of rates, fares, charges, classifications, privileges and regulations shall be remitted to the discretion of the Commission. (See pages 141–142.) That amendment reads as follows:

"If the Commission is of the opinion that the rates, fares or charges, as filed and published, or the classifications, or the privileges, facilities and regulations published in connection therewith are unreasonable or otherwise in violation of law, it shall determine what are and will be reasonable and otherwise lawful rates, fares, charges, classifications, privileges, facilities or regulations, and shall prescribe the same, and shall

order the carrier or carriers to file and publish, on or before a certain day, to take effect on a certain day, schedules in accordance with the decision of the Commission."

So infatuated is the Commission with the dream of power expected to be conferred upon it by Congress, that it betrays in glowing terms the picture which its imagination has already painted in its own mind as to its expected triumphs over the Federal judiciary. On page 26, in referring to the vast range of jurisdiction involved in the cases which will come before it for determination, it says :

"If we have the power to entertain and decide them, these cases will necessarily be numerous and important. The amount of money involved will be much greater than that involved in any trial court in the United States. The result will usually be of more consequence to the litigants than those of any such court."

This is undoubtedly true. Not only would the Commission overshadow the Federal courts as to the importance of its work, but it would exercise over the property and the commercial and industrial interests of this country by delegated power an authority vastly greater than that ever exercised directly by Congress, and greater than that ever exercised by the Chief Magistrate of the nation, except in time of war. At this stage in its public propaganda and solicitation for Congressional support, it may be a proper act of friendship toward the Commission to remind it of the enforced confession of Edyrn, son of Nudd, in the day of King Alfred :

> ' For once when I was up so high in pride,
> That I was half way down the slope to hell."

In reviewing the astounding scheme of autocratic rule proposed by the Interstate Commerce Commission it appears as though its purpose would have been better

expressed if had proposed to repeal all after the enacting clause of the Act to Regulate Commerce, so that it should read thus :

"*Be it enacted, &c.* * * * That the commercial, industrial and transportation interests of the United State shall be conducted according to the eternal principles of justice as interpreted by the Interstate Commerce Commission."

The power of rate-making and the power to dictate the conditions under which the commerce of this country shall be carried on, as outlined by the Commission in its eleventh annual report, constitute a very important part of the national sovereignty. But the national sovereignty in this country is too large a thing and too delicate a thing to be used as an administrative football. It would be absurd beyond description to place it within the power of the Interstate Commerce Commission.

The lessons of the ages dictate that in so far as may be possible, commerce and transportation shall be left to the "watchful enterprise, the neutralizing competition and the severest hazards of individual pursuit." Guided by this fundamental principle of public policy and of liberty this nation has made a grander progress than was ever made by any other nation in the history of the world.

ERRONEOUS STATEMENTS INVOLVED IN THE ATTEMPT TO GAIN AUTOCRATIC POWER.

In its attempt to prove to Congress the necessity for the additional powers which it seeks to acquire the Commission has had recourse to statements which do not bear scrutiny. The first of these misstatements is that the Act to Regulate Commerce as interpreted by the courts has become practically an impotent piece of

legislation. The absurdity of this reiterated statement is manifest from the following considerations:

First. One of the most important functions of the Commission is to institute in the courts proceedings against offenders and to attend to the prosecution of such for the enforcement of the provisions of the Act to Regulate Commerce, and for the punishment of all violations thereof *at the expense of the government of the United States.* This is a manifest beneficence, and may almost be regarded as a paternalism in the interests of complainants.

Second. The fact that the Act to Regulate Commerce makes the finding of the Commission *prima facie* evidence as to each and every fact found, throws the burden of proof upon the carrier, thus giving an important advantage to the complainant. This is a benefit to the complainant not enjoyed under the common law.

Third. In the matter of rates the Commission is endowed with ample power to perform its functions. This is clearly stated by the Supreme Court of the United States in its decision of May 24, 1897, as follows:

"But has the Commission no functions to perform in respect to the matter of rates; no power to make any inquiries in respect thereto! Unquestionably it has, and most important duties in respect to this matter. It is charged with the general duty of inquiring as to the management of the business of railroad companies, to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business. And with this knowledge it is charged with the duty of seeing that there is no violation of the long and short haul clause; that there is no discrimination between individual shippers, and that nothing is done by rebate or any other device to give preference to one against

another, that no undue preferences are given to one place or places, or individual or class of individuals, but that in all things that equality of right, which is the great purpose of the Interstate Commerce Act, shall be secured to all shippers. It must also see that the publicity which is required by Section 6, is observed by the railroad companies."

Besides all this the Commission is on record in its several annual reports to the effect that the railroad companies are yielding obedience to the statute. It has declared that "the administration of the Act to Regulate Commerce has been instrumental in enlightening the public mind and reforming the views of railroad managers."

It has also reported that "the work of regulation is progressing in different ways" and that the Commission "has had great success in the civil and criminal proceedings in the Federal courts, and the determination of suits involving interstate commerce in State courts." Of several hundred complaints heard during one year, only sixteen came to a formal hearing, all the rest being settled through the mediatorial offices of the Commission. Of the sixteen cases heard, the number of proven cases of unjust discrimination did not exceed eleven in the entire country. On the 28th of January, 1897, the Commission declared that "there has been a marked and gratifying decrease in rate-cutting and kindred offences." Even this Eleventh Annual Report presents the strongest possible proof of the efficiency of the law. On page 16 it is stated that "of the 135 formal orders made in suits actually heard from its institution down to the present time, 68 have prescribed a change in rate for the future." It appears, therefore, that during eleven years of the administration of the Act to Regulate Commerce out of the millions of transactions in this vast country, only about

12 orders were on the average issued by the Commission each year. Of these only a little more than 6 each year prescribed a change of rate for the future, which orders, as the Supreme Court has declared, were invalid.

These facts prove beyond the shadow of a doubt that the assertions of the Commission that it is unable to administer the Act to Regulate Commerce have no foundation in the results of its own experiences. Indeed there seems to be some reason to doubt if the Commission could prove one rate in five thousand to be extortionate or relatively unjust. In the administration of human affairs, it is unreasonable to expect a nearer approach to absolute justice.

It would have been very interesting if the Commission had reported what proportion of the 68 cases of orders for the future were complied with by railroad companies who utterly deny the right of the Commission to prescribe rates for the future.

The foregoing is a splendid record for the carriers, and it abundantly indicates the wisdom of the legislators who formulated the Act to Regulate Commerce. It was not the intention of those men to write upon the statute books a law which should prevent every possible cause of complaint, but only to go so far in the work of wholesome regulation as is compatible with that freedom which is the inspiration of enterprise and the surest guaranty of progress. It is not for mortals to enact universal law, or to administer legal expedients or rules of public policy on hard lines. Limitations are of the very essence of free government.

The persistent attempt of the Interstate Commerce Commission to disparage the Act to Regulate Commerce as it stands has tended greatly to weaken it.

The utter absurdity of the intemperate and vengeful

mode of regulation recommended by the Interstate Commerce Commission is not only exposed by the facts already presented, but also by other facts no less significant: (*a*) The average cost of transportation on the railroads of the United States is now only about one-third what it was thirty years ago. (*b*) The number of freight classifications in use has during the last twelve years been reduced from fifty to three. (*c*) The number of through routes and through rates has been increased by thousands during the last thirty years. (*d*) The facilities for transportation, in roadway, equipment and terminals, have been greatly improved and extended. (*e*) A great system of self-government, which is expressed in railroad association, has removed innumerable causes of complaint and evolved the American Railroad System, which is unto the traveler and the shipper as one great instrument of transportation. These achievements, in the nature of reform and of progress are in part the outcome of improved economies, and in part of acquiescence by the companies in the results of their own interaction and of the interaction of the forces of trade, of industry and of transportation. In a word, the the reduction in the cost of transportation on railroads and their marvelously increased efficiency have come about through the processes of an evolution and are in no sense the result of governmental prescience or devisement. Any attempt to substitute for that evolution the authority and behest of the Interstate Commerce Commission would be the gravest political blunder committed in this country since the inauguration of our government.

Besides, in a thousand particulars the railroads have become so thoroughly identified with the needs of commerce and of industry that any intemperate or inappropriate regulation of the former, as proposed by

the Interstate Commerce Commission, would react detrimentally upon the latter. This, of course, points to the practical limitations of just and wholesome regulation of the railroads. In any attempt which may be made to determine such limitations the fact must not be lost sight of that transportation is a mere adjunct of commerce and the productive industries, and necessarily subservient thereto. We live in a world of related interests, in which the better is oft-times the enemy of the good.

ANIMADVERSIONS BY THE INTERSTATE COMMERCE COMMISSION UPON THE FEDERAL COURTS.

The animadversions of the Commission upon the Federal Courts are petulant, undignified and unjust. I confidently believe that a thorough investigation into all those statements would reveal the fact that the Federal Courts have throughout given to the Commission a full and hearty co-operation, and that in no instance have the courts overruled the Commission, except in cases of manifest error and in cases involving the attempts of the Commission to usurp judicial functions or to acquire autocratic power without even the implication of law. In this the courts have been from the beginning the guardians of the liberties of the people.

A QUIBBLE IN REGARD TO RATE-MAKING

The Commission attempts by a quibble to evade the charge that it seeks to gain the power of rate-making by declaring that it has never claimed the right "to prescribe the rate in the first instance." The real rate-maker is he who prescribes the rate in the last instance, and not in the first instance. Besides, the Commission

stultifies itself in this same connection by stating that *sixty-eight of its formal orders "have prescribed a change of rate for the future."*

CONCLUSION.

In its programme of solicited powers the Commission presents to the country the clean cut political issue as to whether it shall or shall not be governed in its commercial and industrial interests by an administrative autocracy.

The assumption that the Interstate Commerce Commission is capable of administering the traffic interests of all the railroads, and thus of dominating the commercial and industrial interests of this country, is absurd beyond expression. In its decision of May 24, 1897, the Supreme Court of the United States intimated that the Commission seemed to "evolve, as it were, out of its own consciousness the satisfactory solution of the difficult problem of just and reasonable rates for all the various roads in the country." The result of such introspection is that the Commission find itself to-day in that region betwixt truth and error "where the haze is thick and the shadows are abundant."

Two kinds of legislative work now confront the American legislator—the one in the line of a better adjustment of National regulation to developed conditions, and the other in the direction of restraining the Interstate Commerce Commission from its mischievous and persistent efforts at the acquisition of autocratic power, the manifest tendency of which is toward political disturbance, and toward that demoralization which is the inevitable result of any attempt to restrain the proper exercise of commercial and industrial freedom.

That the Act to Regulate Commerce is a just and

wise measure of legislation, dictated by true statesmanship, is strenuously maintained. It is unnecessary to enlarge upon that point in this connection. All that is here attempted is to present a protest against the persistent efforts of the Interstate Commerce Commission to acquire power far beyond the purview of those sound rules of public policy which are the guide of National legislation, and beyond those wholesome restraints which constitute the bulwarks of American liberty.

JOSEPH NIMMO, JR.

WASHINGTON, D. C., January 20, 1898.

MEMORANDUM OF JANUARY 28, 1898.

On Saturday, January 22, Senator Cullom, Chairman of the Senate Committee on Interstate Commerce, introduced in the Senate a bill—S. 3354—which proposes to grant to the Interstate Commerce Commission about all it asks for in its last annual report, including the power to determine "rates, fares, charges, privileges or regulations."

APPENDIX.

That the Interstate Commerce Commission, in its struggle for increased power, has misinterpreted Section 3 of the act to regulate commerce seems evident from the following considerations:

Section 3 reads as follows:

"That it shall be unlawful for any common carrier *subject to the provisions of this act* to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, *or locality, or any particular description of traffic* in any respect whatsoever."

From this the Commission concludes that it has the general authority to determine relative rates, notwithstanding the fact that the words "subject to the provisions of this act" necessarily subjects Section 3 to the fundamental provision of Section 1, which reads as follows:

"That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water * * * *for a continuous carriage or shipment.*"

The words *for a continuous carriage or shipment* evidently limits the work of regulation to the adjustment of rates on the line of any particular carrier or on two or more coterminous railroads or rail and water lines engaged in what is commonly known as joint traffic. This is confirmed by the explanatory words "from any place * * * to any other place" and equivalent expressions clearly implying a continuous carriage or shipment. Besides, Section 3 provides that it shall be unlawful for any common carrier or carriers engaged *in joint traffic* to give any undue preference with respect to any locality. This conveys no intimation that the inhibition shall apply to rates on different lines in different parts of the country and excludes that idea.

The power of regulation, even as thus limited, constitutes a very large and important extension of the principle of the common law regarding the duties and obligations of the common carrier. Beyond that, Congress did not go, for the legislator saw dangers of a political and commercial nature which it did not venture to encounter. From beginning to ending the famous report of the Senate Committee, submitted by Senator Cullom on January 18, 1886, contains no intimation of any larger grant of power. Such ideas in regard to railroad regulation as those now proclaimed by the Commission would then have been scouted by Congress as un-American and imperialistic.

True, the railroad companies of the country have acquiesced in many orders and decisions of the Commissioners, which assume the power of

rate-making and go beyond the limitation evidently set by the words "for a continuous carriage or shipment"; but such acquiescence establishes no precedent the effect of which would be to endow a branch of the administrative government of the United States with the autocratic power to dictate the course of the commercial and industrial development in this country. Besides the power to determine the relative rates which shall prevail in different parts of the United States in connection with the general power of rate-making, would involve the power to determine the relative status of towns, cities, States and sections of this vast country. That would inevitably engender sectional strife and hatred of the Government. If permitted it would convert the Commission into an autocracy, involving the worst form of state socialism

The Commission appears to have reached its conclusion in regard to the meaning of Section 3 from some assumed but illy-defined implication of law. But as the Supreme Court of the United States declared in the Cincinnati-Chicago Freight Bureau case in regard to rate-making: "The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions * * * that no just rule of construction would tolerate a grant of such power by mere implication."

The fact must not be lost sight of that the right to establish relative rates in different parts of the country involves a power much greater than that of rate-making.